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82-919

No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CITY OF PHILADELPHIA; ROBERT W. CRAWFORD, COMMISSIONER, DEPARTMENT OF RECREATION OF THE CITY OF PHILADELPHIA; NATHANIEL WASHINGTON, ACTING COMMISSIONER, DEPARTMENT OF RECREATION OF THE CITY OF PHILADELPHIA,
Petitioners

v.

MICHAEL TACYNEC, JAMES MCDONALD AND NORTHEAST PHILADELPHIA STRING BAND, INC.
and
RUSSELL J. GEISER AND SOUTH JERSEY STRING BAND, INC.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Are the Rules of the City of Philadelphia limiting the number of participants in its annual New Year's Day Mummers' Parade violative of the First and Fourteenth Amendment rights of the Respondents who were excluded from the Parade, where the Rules are content-neutral, serve a legitimate and substantial governmental interest, and do not affect Respondents' rights of expression at any other time, place, or manner?

LIST OF ALL PARTIES TO PROCEEDING

Petitioners

City of Philadelphia

Robert W. Crawford, Commissioner, Department of Recreation of the City of Philadelphia

Nathaniel Washington, Acting Commissioner, Department of Recreation of the City of Philadelphia

Respondents

Michael Tacynec

James McDonald

Northeast Philadelphia String Band, Inc.

-and-

Russell J. Geiser

South Jersey String Band, Inc.

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IN THE

SUPREME COURT OF THE UNITED STATES

CITY OF PHILADELPHIA; ROBERT W. CRAWFORD, COMMISSIONER, DEPARTMENT OF RECREATION OF THE CITY OF PHILADELPHIA; NATHANIEL WASHINGTON, ACTING COMMISSIONER, DEPARTMENT OF RECREATION OF THE CITY OF PHILADELPHIA,

Petitioners

v.

MICHAEL TACYNEC, JAMES MCDONALD AND NORTHEAST PHILADELPHIA STRING BAND, INC. AND RUSSELL J. GEISER AND SOUTH JERSEY STRING BAND, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit was filed September 2, 1982, and is reported at 687 F.2d 793 (3rd Cir. 1982). The Opinion of the United States District Court for the Eastern District of Pennsylvania was filed November 5, 1981, and is not officially reported. Copies of both Opinions appear in the Appendix at p. A-1 and p. A-7.

STATEMENT OF JURISDICTION

Judgment was entered in the United States District Court for the Eastern District of Pennsylvania against Petitioners on November 5, 1981. This Judgment was reversed and remanded to the District Court by the United States Court of Appeals for the Third Circuit by Opinion dated September 2, 1982.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

TEXT OF CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section I:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Broad Street, in the heart of the City of Philadelphia, Pennsylvania ("City"), is the site of an annual parade on New Year's Day, January 1, called the Mummers' Parade, which the Court of Appeals referred to, correctly, as "One of Philadelphia's well-established traditions." (Appendix, p. A-9). In an effort to limit the Parade to the daylight hours of New Year's Day and thereby avoid serious safety and traffic hazards in the City caused by the extension of the Parade into the night, the City has adopted rules which limit the length of the Parade by restricting the number of participants, and which provide for new participants to be selected by lottery in the event of a vacancy or disqualification.[1]

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1. The rules challenged by Respondents are fully set forth as follows:

Rules Governing Participating Organizations in the 1982 Mummers Parade.

1. Participation in the 1982 Mummers Parade shall be limited as follows:

(a) The number of string bands shall be limited to 23.
(b) The number of fancy clubs shall be limited to 4.
(c) The number of brigades shall be limited to 20.
(d) The number of comic clubs shall be limited to 5.

2. Each string band, fancy club, brigade and comic club which marched in the 1980 New Year's Day Parade shall be eligible to march in the 1982 parade provided that it submits to the Department of Recreation not later than August 31, 1981, a statement by an authorized person that it is able to comply with all the requirements for participation set forth in the rules for its division.

3. Notwithstanding paragraph 2 above, no string band, fancy club, brigade or comic club will be automatically eligible if it has been disqualified by the judges for the two preceding years.

4. In the event that fewer than 23 string bands, 4 fancy clubs, 20 brigades or 5 comic clubs are deemed eligible to participate by the Department of Recreation after August 31, 1981, any open slot shall be filled by lottery.

Respondents, who are two string band organizations and the individual members of those organizations, have been precluded from marching in the Mummers' Parade as the Northeast and South Jersey String Bands, because there were no vacancies in the 23 allotted positions for string bands, under Rule 1(a). They brought this action to gain access to the Parade on the grounds that their First and Fourteenth Amendment rights of expression were violated by the City's rules limiting participation in the Parade to 23 string bands.

Although the District Court found that the rules were both content-neutral and served a significant governmental interest, it granted Respondents' request for a preliminary injunction permitting their participation in the Parade on the ground that the City's rules were not "the least restrictive means of accomplishing the valid governmental interest" (Appendix, p. A-5) of limiting the length of the Parade.

The City appealed the District Court's Judgment to the United States Court of Appeals for the Third Circuit. The Court of Appeals, in an opinion by Judge Arlin M. Adams, filed September 2, 1982, vacated the Judgment of the District Court and remanded the case for further proceedings.

The Court of Appeals, affirming the District Court's conclusion that the City's Parade rules were content-neutral and served a significant governmental interest, held that the District Court had erred in judging the City's rules by the "least restrictive means" analysis. The Appeals Court, therefore, remanded the case for a determination of whether the Respondents have an "adequate alternative forum" given the size of the audience, the prestige of an alternative parade, and the relative ability of another audience to appreciate the plaintiffs' expressive message. Through its instruction on remand, the Court of Appeals concluded that Philadelphia's rules limiting the length of its Mummers' Parade are valid only if 1) the rules are content-neutral; 2) the rules serve

a substantial governmental interest; and 3) the Respondents, who are thereby not permitted to participate, have an *equivalent* forum elsewhere in terms of prestige and audience size and sophistication. Thus, assuming the District Court was correct in its conclusion that "The Mummers' Parade is the unique day of the year for mummery," (Appendix, p. A-5), it is almost a foregone conclusion that the District Court will find that no adequate alternative exists. Accordingly, under the standard set forth by the Court of Appeals, there is a virtual bar to *any* regulations by the City of the length of its Parade or the number of participants.

The grant of the Writ of Certiorari is thus appropriate at this time in order to avoid the needless expenditure of judicial time and resources that would be necessitated by a remand. Since the Court of Appeals has remanded the case for consideration in the District Court under an incorrect legal standard, such remand would be a pointless review. Moreover, since the outcome of the District's Court's reconsideration is virtually a foregone conclusion, based on the required application of an incorrect legal standard to facts previously determined there, it is inevitable that this case will again be before this Court, on Petition for Writ of Certiorari, where the legal issue will be the same as that now presented.

Accordingly, the City files this Petition for a Writ of Certiorari urging this Court to review and reverse the Opinion and Order of the Court of Appeals.

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS EFFECTIVELY PRECLUDES THE CITY OF PHILADELPHIA FROM LIMITING THE NUMBER OF PARTICIPANTS IN ITS NEW YEAR'S DAY MUMMERS' PARADE EVEN THOUGH THE CITY'S RULES ARE CONTENT-NEUTRAL AND SERVE A LEGITIMATE AND SUBSTANTIAL GOVERNMENTAL INTEREST, AND DO NOT REGULATE OR LIMIT THE RIGHTS OF RESPONDENTS TO PERFORM AT ANY OTHER TIME, PLACE, OR MANNER. THE DECISION OF THE COURT OF APPEALS IS THEREFORE IN DIRECT CONFLICT WITH NUMEROUS DECISIONS OF THIS COURT.

On New Year's Day, January 1, of each year, the City of Philadelphia is host of an annual Mummers' Parade on Broad Street, one of the main thoroughfares of the City, involving thousands of participants and hundred of thousands of viewers, who watch the Parade both live and on television.

In an effort to control the public safety problems that arose because of the extension of the Parade throughout the entire day and into the night, the City developed rules designed to limit the number of participants in the Parade, to keep the Parade to a manageable length, so that it could be concluded during the daylight hours. These rules, in their present form, limit the number of participating organizations, and establish a lottery system for filling vacancies as they occur.[2] Because there were no vacancies in the string band section of the Parade, Respondents, who are two string bands and individual members, instituted this litigation seeking to invalidate the rules insofar as they limit participation in the Parade to 23 string bands as violative of their First and Fourteenth Amendment rights.

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2. The rules challenged by Respondents are fully set forth at footnote 1, page 3, supra.

Although the Court of Appeals agreed with the District Court that the City's rules are content-neutral and serve a legitimate and substantial governmental interest, the Court of Appeals concluded that the rules are valid only if, in addition, the Respondents have an "adequate alternative forum" considering factors:

> "such as the size of the audience, the prestige of an alternative parade, and the relative ability of another audience to appreciate plaintiffs' expressive message." (Appendix, p. A-16).

Should the District Court conclude on remand, consistent with its earlier finding, that "The Mummers' Parade is the unique day of the year for mummery" (Appendix, p. A-5), *i.e.*, that the New Year's Day audience is the largest, that the Parade is the most prestigious for mummers, and that the audience is the most appreciative, then pursuant to the direction of the Court of Appeals it must invalidate the City's rules which put a limit on the number of participants in the parade and thereby limit its size and length.

The Court of Appeals erred in directing the lower Court to undertake such an examination, for no holding of this Court even remotely suggests that the City is precluded from imposing reasonable time, place, and manner restrictions on this Parade simply because it is the best of its kind. Yet, under the direction of the Court of Appeals, if the District Court finds that no other parade or event in the City offers the *same degree* of prestige and exposure, the City will be barred, on First Amendment grounds, from denying participation in the Mummers' Parade to any group or individual who wishes to participate.[3]

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3. The invalidation of the City's rules on "adequate alternative forum" grounds would make *any* limitation on participation impossible. This Court's decision in *Heffron v. International Society for Kirshna Consciousness*, 452 U.S. 640 (1981), recognizes that it is improper to focus only upon the "incidental effect" on Respondents.

By using the Mummers' Parade itself as the standard against which alternatives must be judged, the Court of Appeals has made it almost impossible to find anything other than another New Year's Day Mummers' Parade to be an adequate alternative forum. Thus, the Appeals Court has effectively granted Respondents the right to march in a particular place, at a particular time, and in a particular manner. This Court has never previously mandated such a result. Rather, reasonable time, place, and manner restrictions on First Amendment activity have been consistently approved so long as they are content-neutral, serve a significant government interest, and "leave open ample alternative channels for communication of the information." *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 648 (1981), citing, *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976); *Consolidated Edison Co. v. Public Service Comm'n.*, 447 U.S. 530, 535 (1980). Thus, the focus for judicial scrutiny should be the burdens imposed by the City's regulations on Respondents' ability to communicate their message in alternative forums, *not* on whether or not there is an equivalent Mummers' Parade in Philadelphia.

In focusing on the nature of the forum rather than on the City-imposed burdens, if any, on the Respondents' right of free expression, and in directing the inquiry at the uniqueness of the Mummers' Parade itself, the Court of Appeals seems to have gone far beyond this Court's relatively clear standard by which such First Amendment regulation is to be judged.

NOTE 3 — *(Continued)*

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since invalidation of the rules must necessarily apply to all "similarly situated groups". This Court must recognize that by virtue of the Court of Appeals decision, the City would be prohibited from achieving its legitimate governmental interest of monitoring crowd safety on New Year's Day, and would be unable to regulate a potentially infinite expansion of the size and length of the parade. See *Heffron*, *supra*, at 654.

In *Heffron, supra*, this Court refused to invalidate a rule which had as its effect the exclusion of a Krishna organization (ISKCON) from a booth at the Minnesota State Fair. In upholding the State Fair rule allocating booths as a valid time, place, and manner restriction, the Court held that since the State Fair rule only applied to the Fair itself, it could not be invalidated on the ground that the State had failed to *provide* an alternative forum. Rather the question to be resolved under First Amendment challenge was whether the rule *precluded* ISKCON's use of alternative forums:

> For Rule 6.05 to be valid as a place and manner restriction, it must also be sufficiently clear that alternative forums for the expression of respondents' protected speech exist despite the effects of the Rule. Rule 6.05 is not vulnerable on this ground. First, the Rule does not prevent ISKCON from practicing Sankirtan anywhere outside the fairgrounds.

Id. at 654-655.

Like the rule in *Heffron*, the rules promulgated by the City do not prohibit the Respondents or their members from performing elsewhere in the City. Indeed, the record in the District Court is clear that the Respondents regularly meet to play their music and have given numerous performances throughout the year at locations throughout the City and surrounding communities. Further, the individual Respondents were not denied access to the Parade, as they had been members of other bands and had participated in the Parade in earlier years as members of those bands. Additionally, the Respondents are not prevented by the rules from participating in other parades or events in the City of Philadelphia. Furthermore, should a currently participating string band choose not to participate in the Parade or in the event such a string band is disqualified, the Respondent bands

will have the opportunity to participate in the Parade if successful in the lottery established under the City's Rule 4 (see footnote 1, at p. 3, *supra*.)

There is no holding of this Court which even suggests that the *uniqueness* of a particular fair, parade, or other event, is sufficient to preclude any regulation which might exclude a prospective participant. Such a rule — effectively that set forth by the Court of Appeals — places an intolerable burden upon the government. It ignores the fact that limiting the Parade to daylight hours is a "legitimate, governmental concern." See, *Avins v. Rutgers, State Univ. of New Jersey*, 385 F.2d 151 (3d Cir. 1967), *cert. den.*, 390 U.S. 920 (1968) (First Amendment does not require that law review of state university provide space for every author who submits publication material); *We've Carried the Rich for 200 Years Let's Get Them Off Our Backs — July 4th Coalition v. City of Philadelphia*, 414 F.Supp. 611 (E.D. Pa. 1976), *aff'd.*, 538 F.2d 322 (3d Cir. 1976) (Denial of parade permit does not violate First Amendment where alternative route is permitted). Under such a rule, should 2, 20, 200, or 2000 additional bands desire to participate in the Mummers' Parade, the City would be obliged to include them all. To require the City to make the Parade such an unlimited forum is to ignore the enormity of the problems confronting City officials administering the Parade and totally disregards the decisions of this Court which recognize that *some* regulation must be permitted. In *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941), a unanimous Court held:

> "If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place, and manner in relation to the other proper use of the streets."

The result produced by the Court of Appeals' mandate here is inconsistent with this well-recognized acknowledgement of municipal authority. "The right to freedom of speech does not open every avenue to one who desires to use a particular outlet for expression." *Avins, supra,* at 153.

The decision of the Court of Appeals may eliminate the possibility of any limitation on the length of this Parade because of its requirement that any alternative forum be judged against the Parade itself. The criteria set out by the Court of Appeals injects a totally new and injurious standard into the delicate balancing process between individual First Amendment rights and the rights of a municipality to promulgate reasonable time, place and manner regulations for the protection of all citizens. Thus, the Opinion of the Court of Appeals directly conflicts with the Court's decision in *Heffron, supra, Cox, supra,* and accordingly with this Court's traditional First Amendment analysis which has permitted such regulation.

> "[T]he privilege of a citizen of the United States to use the streets and parks . . . may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order, but it must not, in the guise of regulation, be abridged or denied."

Hague v. Committee for Industrial Organization, et al., 307 U.S. 496, 515-516 (1938). Since the decision of the Court of Appeals precludes such legitimate regulation, that decision is constitutionally infirm and must be reversed.

CONCLUSION

The Court of Appeals erred to the extent that it required an *equivalent* forum for the Respondents when factors such as the size of the audience which watches the Philadelphia New Year's Day Mummers' Parade, the prestige of other parades, and the ability of other audiences to appreciate Respondents' performance are considered. Those factors are irrelevant to the validity of the City's rules which place a limit on the length of a particular parade, on a particular date, and do not limit in any way Respondents' expression at any other time, place, or manner. Since the Parade rules are content-neutral and serve a substantial governmental interest, and because the rules do not preclude Respondents' use of other forums, the rules should not be invalidated under the First or Fourteenth Amendments.

For the reasons stated above, a Writ of Certiorari should issue to review the Judgment and the Opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

MARK A. ARONCHICK*
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* A member of the Bar of the Supreme Court.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

NORTHEAST PHILADELPHIA STRING BAND, et al.	:	CIVIL ACTION
vs.	:	
CITY OF PHILADELPHIA	:	NO. 80-3503
SOUTH JERSEY STRING BAND, INC., et al.	:	CIVIL ACTION
vs.	:	
CITY OF PHILADELPHIA	:	NO. 81-2249

MEMORANDUM

GREEN, J. NOVEMBER 4th, 1981

Michael Tacynec and James McDonald left the Dick Crean String Band and formed the Northeast Philadelphia String Band. They sought permission from the Department of Recreation for the city of Philadelphia to march in the string band division of the Philadelphia's New Year's Shooters' and Mummers' Association's 1981 parade; that request was denied.[1]

Tacynec, McDonald, and Northeast filed a complaint to enjoin their exclusion from the parade. Based on a finding that the city had arbitrarily restricted the exercise of plaintiffs' First Amendment rights, this court

1. Plaintiffs seek permission only to march in the Mummers' Parade, not to separately march at the same time and place as the Mummers' Parade. Thus I don't see the applicability of cases cited by the City which state that "two parades cannot march on the same street simultaneously and the city may allow only one." We've Carried the Rich for 200 Years, Let's Get Them Off Our Backs — July 4th Coalition v. City of Philadelphia, 414 F. Supp. 611, 613 (E.D. Pa. 1976). The deduction cannot be made therefrom that "one's right of expression cannot be made specific as to a particular time, place or manner." (Defendants' motion for summary judgment p. 5). Rather "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 556 (1975) *quoting* Schneider v. State, 308 U.S. 147, 151 (1959).

granted a preliminary injunction and Northeast marched in 1981. Regulations subsequently established would now prohibit participation in 1982 by Northeast as well as the other plaintiff band, the South Jersey String Band.[2] Both bands seek admission to the January 1, 1983 parade. After a final evidentiary hearing, plaintiffs' motion for a permanent injunction will be granted.

Since "private action abridging individual rights is permitted absent state action, "*Burton v. Wilmington Parking Authority*," 365 U.S. 715, 721 (1961), plaintiffs' rights depend on the degree of the city's contacts with the parade. Here the nexus is more than sufficient to constitute state action because: (1) the parade is conducted under a permit issued to the Mummers' Association by the city's Department of Licenses & Inspections; (2) the city council appropriates large sums of money for the parade;[3] (3) arrangements and rules for the parade are made jointly by the Philadelphia Mummers Association and the Recreation Commissioner for the city of Philadelphia; and (4) "[t]he Recreation Commissioner has sole authority to determine which individuals and clubs may participate in the parade." (uncontested fact no. 14 of the final joint pre-trial order.).

The regulations permit each of the twenty-three string bands that marched in 1980 to participate in all future parades. Unless one of these bands withdraws or is dropped from the parade,[4] no additional string bands will be selected. Northeast and South Jersey are excluded solely because of their absence from the 1980 parade which predates the existence of both bands. The City does not deny that the regulations affect plaintiffs' First Amendment rights, but claims that these regula-

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2. The two cases were consolidated and tried to the court without a jury. This memorandum constitutes the findings of fact and conclusions of law as required by Fed. R. Civ. P. 52.

3. The city appropriated $300,000 for the 1980 parade.

4. A band is dropped only if it is disqualified from the parade for two consecutive years.

tions are reasonable time, place, and manner restrictions on those rights. Also, the City argues that the use of a grandfather clause to determine eligibility to participate in the parade is a valid classification even when applied to plaintiffs' First Amendment rights.

The requirements for valid time, place, and manner restrictions are that: (1) no distinctions be drawn according to either the content or subject matter of the speech to be regulated; (2) a significant governmental interest be served; and (3) the least restrictive means be employed to accomplish those interests. *Heffron v. International Society of Krishna Consciousness, Inc.*,——U.S.——, 49 U.S.L.W. 4762 (1981); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980); *United States v. O'Brien*, 391 U.S. 367 (1968). The first two requirements have been met. Presence in the 1980 parade determines future participation. If any of the 1980 string bands withdraws or is dropped, a replacement will be chosen by lot. The content or subject matter of the music played by the string band does not come under consideration and is not a factor in selecting participants. The second requirement is met because the City seeks to shorten the parade and thereby avoid the difficulties of protecting the public's safety after nightfall. The protection of the public safety is a valid governmental interest. *Heffron, supra*, 49 U.S.L.W. at 4765; *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

The City, however, has not chosen the least restrictive means to shorten the parade. The City alleges that each of these new bands would add seven to eight minutes to the parade's length. The evidence establishes that the City intentionally decided not to adopt an alternate and less restrictive means of accomplishing the stated objective of limiting the time for the parade. The regulations shorten the parade by limiting the string band section to twenty-three bands; however, the evidence establishes that the City adopted the regulation to

advance a nongovernmental interest of the City, the protection of the traditional string band. The regulation discourages individual members of established bands from defecting to new bands and protects established bands from the competition of new bands. There is no evidence that twenty-three string bands are the optimum number for the time allocated to string bands. The number of bands selected was not dictated by time restriction. The City official in charge of the 1982 parade testified that he would have accommodated all the traditional bands, whether twenty-three or fifty. It is clear that the regulation adopted is not the least restrictive regulation possible to accomplish the valid governmental interest of protecting the public's safety. The regulation intentionally is designed to exclude Northeast which participated in the 1981 parade pursuant to court order, and South Jersey merely because they are new bands and not part of the established order. The City argues that the use of a grandfather clause to allocate the limited time set for string band performances does not violate the First Amendment rights of plaintiffs and thus the least restrictive means need not be employed.

A grandfather clause is a "[p]rovision in a new law or regulation exempting those already in or a part of the existing system which is being regulated." *Black's Law Dictionary* (5th ed. 1979). The City's regulation guarantees the continued participation in the parade of string bands which marched in the 1980 parade and limits the opportunity for new bands to participate. Only if a vacancy occurs will a new band be selected by lottery from a pool of qualified new applicants. The City cites three cases said to support the use of the grandfather clause: *Heffron, supra; New Orleans v. Dukes*, 427 U.S. 297 (1976), and *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1976). None of the cited cases permit the use of a grandfather clause to allocate First Amendment rights. *Heffron* does not involve a grandfather clause; the issue before the court was a

challenge to a rule which required all sales, exhibition or distributions of material to be done from fixed locations. True, the allocation of booths at the fair on a first-come first-serve basis is mentioned and not disapproved; however, a first-come first-serve basis for the annual allocation of space is not a grandfather clause as no preference is established based on prior participation. Indeed, *Heffron* emphasizes that equal access to a public forum cannot be denied. 49 U.S.L.W. at 4765, 4766. *Dukes* concerned an Equal Protection Clause challenge to a statute which prohibits pushcart sales in the French Quarter by anyone who had not operated a pushcart business in the French Quarter for eight years. Since this economic regulation did not involve a fundamental right, the Court upheld it as rationally related to a legitimate state interest. Here, plaintiffs invoke the First Amendment claiming that a protected fundamental right is violated. *National Citizen* involved broadcast renewal procedures which are a special area of first amendment law given that the air waves are a limited resource.

The Mummers' Parade is the unique day of the year for mummery. The regulation adopted by the City would require that those who desire to march in the city sponsored New Year's Day parade must do so with one of the preferred established bands or be excluded. The City has not demonstrated that the regulation adopted is the least restrictive means of accomplishing the valid governmental interest. The evidence established that the parade can be held in the allotted time by merely reducing by less than two minutes the time of performance of each band before the judges' reviewing stand. I am convinced that the City is concerned more with protecting the established bands than protecting public safety. Plaintiffs are entitled to the injunctive relief sought and judgment will be entered accordingly.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORTHEAST PHILADELPHIA STRING BAND, et al.	:	CIVIL ACTION
vs.	:	
CITY OF PHILADELPHIA	:	NO. 80-3503
SOUTH JERSEY STRING BAND, INC., et al.	:	CIVIL ACTION
vs.	:	
CITY OF PHILADELPHIA	:	NO. 81-2249

ORDER

AND NOW, this 4th day of November, 1981, IT IS ORDERED that the City of Philadelphia is enjoined from excluding the Northeast Philadelphia String Band and the South Jersey String Band from the 1982 Mummers' Day Parade. IT IS FURTHER ORDERED that both the Northeast Philadelphia String Band and the South Jersey String Band may not be excluded from the lottery for position of string bands in the 1982 Mummers' Day Parade.

BY THE COURT:

CLIFFORD SCOTT GREEN, J.

ENTERED: 11-5-81

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3055

MICHAEL TACYNEC, JAMES McDONALD and
NORTHEAST PHILADELPHIA STRING BAND, INC.

v.

CITY OF PHILADELPHIA; ROBERT W. CRAWFORD, Commissioner, Dept. of Recreation of the City of Philadelphia; PHILADELPHIA NEW YEAR SHOOTERS AND MUMMERS ASSOCIATION, INC.; AQUA STRING BAND INC.; AVALON STRING BAND INC.; BROOMALL STRING BAND, INC.; DUFFY STRING BAND INC.; DURNING STRING BAND INC.; FERKO STRING BAND INC.; FRALINGER STRING BAND INC.; GREATER KENSINGTON STRING BAND INC.; GREATER OVERBROOK STRING BAND INC.; HEGEMAN STRING BAND INC.; POLISH AMERICAN STRING BAND INC.; QUAKER CITY STRING BAND INC.; SOUTH PHILADELPHIA STRING BAND, INC.; TRILBY STRING BAND INC.; UPTOWN STRING BAND INC.; WOODLAND STRING BAND INC.

(D.C. Civil No. 80-3503)

RUSSELL J. GEISER;
SOUTH JERSEY STRING BAND, INC.

v.

CITY OF PHILADELPHIA;
ROBERT W. CRAWFORD,

Appellants

(D.C. Civil No. 81-2249)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(C. A. Nos. 80-3505 and 81-2249)

Argued July 20, 1982

Before: ADAMS and HIGGINBOTHAM, *Circuit Judges*,
and TEITELBAUM, *District Judge**

(Filed September 2, 1982)

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String Band, Inc.

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* Hon. Hubert I. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

ADAMS, *Circuit Judge.*

This case concerns the First Amendment rights of string bands to perform in Philadelphia's Mummers Parade and the proper standards to be used in evaluating the constitutionality of the Parade Rules. In 1981, the City adopted rules to limit the number of bands that could participate in the parade. The plaintiffs are two string bands and their founders, who would be excluded from marching by these Rules, unless a current parade participant does not march. They filed this action in the district court alleging that the regulations unconstitutionally inhibited their First Amendment freedoms of expression and association. The district court struck down the Rules as an invalid infringement of the bands' freedom of expression and therefore did not reach the freedom of association claim. Because we find that the district court did not apply the proper test in judging the Rules, the case will be remanded both for reconsideration of the free expression claim as well as a determination of the freedom of association claim.

I. *FACTUAL BACKGROUND*

One of Philadelphia's well-established traditions is its annual Mummers Parade on New Year's Day. The parade includes thousands of participants, and draws many times that number of spectators. In recent years, the parade has ended after dark, thus creating serious safety and traffic hazards in the city. The parade is arranged and administered jointly by the Philadelphia Shooters and Mummers Association (a private organization) and the Recreation Commissioner of the City of Philadelphia. The Commissioner determines which groups may participate in the parade.

An important division of the parade consists of the string bands, units containing between 48 and 64 parad-

ers performing music primarily on string, reed and percussion instruments, wearing elaborate original costumes and presenting a special theme. These units are judged on their performances, and cash prizes, paid by the city, are awarded to all bands. In 1980, the prizes ranged from $7,000 for first place to $2000 for last place. Undisputed Fact 9, Joint Appendix at 64a.

The Northeast Philadelphia String Band ("Northeast"), one of the plaintiffs in this case, was formed in February 1980, and applied to participate in the 1981 Mummers Parade. At that time, there was an unwritten policy that no new bands would be admitted to the parade, except to fill vacancies. When the Recreation Commissioner failed to admit Northeast to the parade, the band filed suit in the federal district court. Northeast alleged that the admission policy violated its First Amendment rights of free expression and association by preventing it from performing in the parade and by penalizing musicians who chose to join the new band rather than remaining in an older, established band. In 1981, the South Jersey String Band was formed and, when denied admission to the 1982 Mummers Parade, joined in the litigation commenced by Northeast.[1]

Under an order of the district court, the city in July 1981 officially published its rules limiting parade admittance to those string bands that had marched in the 1980 parade, with vacancies to be filled by lottery. The city justified these restrictions as necessary to end the parade before dark, thus protecting public safety. Following a bench trial, the district court held that the

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1. Under the terms of two injunctions issued by the district court, Northeast participated in the 1981 and 1982 parades, and South Jersey participated in the 1982 parade.

plaintiffs' activity was a form of protected expression and the city could delimit that freedom only by the least restrictive means of achieving its goal of public safety. Since the court found that there were other means of shortening the parade that would not prevent the plaintiffs from performing, it struck down the Rules and permanently enjoined the city from denying the bands admittance to the parade. It is from this judgment that the city has appealed.

II. *ISSUES PRESENTED*

This controversy raises several important First Amendment issues. First, we must decide whether the plaintiffs' activity, a band performance, is a form of expression protected by the amendment. Second, we must consider the proper test for determining the constitutionality of content-neutral regulations that infringe on protected expression. Third, we must address the plaintiffs' freedom of association claim, and the validity of content-neutral regulations in this context. Finally, it is necessary for us to discuss the effect of impermissible motive on the part of the city, and the standard for evaluating regulations that may be tainted in this manner.

A. *Protected Expression*

Each band that marches in the Mummers Parade prepares a thematic arrangement. It then selects its music, costumes and drill work to express its own artistic conception of that theme. The district court concluded, and we agree, that this form of expression is protected by the First Amendment.

The City of Philadelphia argues that because the plaintiffs' activity does not convey an overtly political or ideological message, it is not "speech" and therefore is

not entitled to First Amendment protection.[2] However, the Supreme Court has made it clear that "[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (citations omitted) (non-obscene nude dancing). *See also, Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (human cannonball performance); *Young v. American Mini-Theatres*, 427 U.S. 50 (1976) ("adult" films); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (the musicial production "Hair"); *Goldstein v. Town of Nantucket*, 477 F. Supp. 606 (D. Mass. 1979) (folk music). Because the Mummers-type string band performance is a form of expressive entertainment, we hold that it is covered by the First Amendment.[3]

B. *Time, Place and Manner Restrictions*

Having found that the activity in question here is protected under the First Amendment, we proceed to consider whether the district court applied the correct test in examining the Recreation Commissioner's string band rules. The rules limit the number of bands performing in the parade to 23, the number that participat-

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2. In its brief to the district court and its initial brief to this Court, the city apparently conceded the applicability of the First Amendment to this actvity. However, during oral argument (and in its supplemental brief), the city raised the argument that the band performances were not forms of con stitutionally protected expression. Although we do not ordinarily consider arguments raised for the first time on appeal, *Newark Morning Ledger Co. v. United States*, 539 F.2d 929, 932 (3d Cir. 1976), this rule may be waived to consider constitutional questions.

3. The district court found that because of the city's involvement with the parade, the requirement of "state action" had been met. The parties do not contest this finding on appeal.

ed in the 1980 parade. Each band that marched in 1980 is entitled to a position, and if one of those bands chooses not to march, or is disqualified, a new band is chosen by means of a lottery.[4] The plaintiffs contend, and the district court concluded, that because these regulations are not the least restrictive means of shortening the parade, they violate the plaintiffs' First Amendment rights and must be struck down.

Rules such as those in question here can be upheld against constitutional challenge if they are valid "time, place, or manner restrictions," a concept first discussed by the Supreme Court in *Cox v. New Hampshire*, 312 U.S. 569 (1941). In *Cox*, the Court upheld a city ordinance which required that licenses be obtained before all parades. Because the city had an obligation "to assure the safety and convenience" of its citizens, it could regulate traffic on the streets. *Id.* at 574. The Court held that "[i]f a municipality has authority to control the use of its

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4. Rules Governing Participating Organizations in the 1982 Mummers Parade:

1. Participation in the 1982 Mummers Parade shall be limited as follows:

(a) The number of string bands shall be limited to 23.

* * *

2. Each string band, fancy club, brigade and comic club which marched in the 1980 New Year's Day Parade shall be eligible to march in the 1982 parade provided that it submits to the Department of Recreation not later than August 31, 1981, a statement by an authorized person that it is able to comply with all the requirements for participation set forth in the rules for its division.

3. Notwithstanding paragraph 2 above, no string band, fancy club, brigade or comic club will be automatically eligible if it has been disqualified by the judges for the two preceeding years.

4. In the event that fewer than 23 string bands, 4 fancy clubs, 20 brigades or 5 comic clubs are deemed eligible to participate by the Department of Recreation after August 31, 1981, any open slot shall be filled by lottery.

* * *

public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets." *Id.* at 576.

To determine whether the parade rules were valid "time, place, and manner" restrictions on the plaintiffs' freedom of expression, the district court in the present case applied the following test: "(1) no distinctions be drawn according to either the content or subject matter of the speech to be regulated; (2) a significant government interest be served; and (3) the least restrictive means be employed to acomplish those interests." *Appendix* at 249a (citing *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)). We agree with the district court's understanding of the first two elements of this test, but we conclude that it has misconstrued the third element. The Supreme Court has repeatedly listed the availability of adequate alternative forums as the third requirement of any time, place and manner restriction. *See Heffron, supra, Metromedia Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981) (plurality opinion); *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 132 (1981); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976). *See also Ad World, Inc. v. Township of Doylestown*, 672 F.2d 1136 (3d Cir. 1982).

In *Heffron, supra*, the Supreme Court considered the constitutionality of regulations prohibiting groups from selling literature or soliciting funds in various areas of the Minnesota State fairgrounds. The Court, in upholding the fairground rules as valid time, place, and manner restrictions, elaborated on the criteria by which challenged regulations must be judged. Although the opinion does mention "less restrictive means" (*Heffron*

at 654), it does not appear to be adopting that as a test. Rather, the Court was questioning whether, even were that stringent standard to be applied, the regulation in question could be struck down.

In contrast with its conjectural language on that point, the Court put forth the traditional requirements for a valid, time, place and manner restriction in clear definitive statements. "A major criterion . . . is that the restriction 'may not be based upon either the content or subject matter of the speech.' " *Id.* at 648 (citations omitted). "A valid time, place and manner regulation must also 'serve a significant governmental interest.' " *Id.* at 649 (citations omitted). "For [a regulation] to be valid as a place and manner restriction, it must also be sufficiently clear that *alternative forums for the expression of respondents' protected speech exist* . . ." *Id.* at 654 (emphasis added). In addition, it is significant that the Court began its opinion in *Heffron* by citing a passage from *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), which defines valid time, place and manner restrictions as including "ample alternative channels for communication," but says nothing about less restrictive means of regulation. *See also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981) (plurality opinion); *Lindmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977); *Young v. American Mini-Theatres*, 427 U.S. 50, 62-63 (1976) (upholding zoning law in part because it did not limit the number of "adult" theatres); *Ad World, Inc. v. Township of Doylestown*, 672 F.2d 1136, 1142 (3d Cir. 1982), *cert denied*, 102 S. Ct. 2240 (1982) ("an essential characteristic of any acceptable place, time and manner regulation is that it leave adequate alternative methods of communication").

As these cases make clear, the proper third requirement for evaluating a time, place and manner restriction

is the availability of an adequate alternative forum from which the speaker or performer may express himself, and not proof that this regulation is the least restrictive means of achieving the government's objectives. The "least restrictive alternative" analysis has traditionally been used in situations where the government has regulated expression *because* of its content. *See Widmar v. Vincent*, 50 U.S.L.W. 4062 (U.S. Dec. 8, 1981); *Police Dept. v. Mosely*, 408 U.S. 92 (1972); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Martin v. City of Struthers*, 319 U.S. 141 (1943). In these cases, the Court has applied "the most exacting scrutiny" (*Widmar* at 4066) to determine whether there is any method of achieving the state's nondiscriminatory purposes (such as protection of public safety), which has a lesser effect on protected expression. If any "less restrictive" alternative exists, the state's action is invalid regardless of the existence of other forums for the protected expression. The Court has imposed this stringent requirement because of the danger to First Amendment freedoms inherent in a content-based scheme of regulation.

By contrast, content-neutral regulations do not pose this threat since the government is not taking a position supporting or opposing one point of view relative to another. Because of this, the Court has used the less stringent "alternative forum" test in these situations. Here the relevant inquiry focuses on the speaker or performer and his ability to have his views expressed, rather than on the state, and its choices in drafting legislation. In determining whether an "adequate alternative forum" exists in the present case, the district court may wish to consider factors such as the size of the audience, the prestige of an alternate parade, and the relative ability of another audience to appreciate the plaintiffs' expressive message. Of course, no one of these factors is necessarily determinative. Because the district court made no findings as to the existence of an adequate alternative to

the Mummers Parade, we must remand the case to resolve this issue.[5]

C. *Freedom of Association*

In addition to their freedom of expression claims, the plaintiffs contend that the parade regulations enacted by the Commissioner of Recreation violate their First Amendment right of association. The plaintiffs allege that the rules infringe their members' right of association because they permit established bands to march, but make it extremely difficult for new bands to enter the parade. The plaintiffs argue that this provision has two effects. It discourages individuals from leaving old bands to form new ones, and it penalizes those who have already left the old bands. Because of these effects, the rules are said to place unconstitutional burdens on the musicians' rights to choose their associations free from government intervention. Because the district court struck down the rules on freedom of expression grounds, it did not reach the plaintiffs' freedom of association challenge.

The individual members of the bands in question have joined together to perform Mummers-type music and drills in the parade. Because this is a form of protect-

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5. The district court need not make additional findings on the first two elements of the test — content-neutrality and substantial government interest — as we agree with its determination that those elements have been satisfied. Both parties agree that the city had no knowledge of the content of the plaintiffs' performances when they were denied admittance to the parade. (Undisputed Facts 37 and 38; Appendix at 69a). The Parade Rules bar the city from admitting any new bands, regardless of content, except by lottery when a vacancy occurs. (Parade Rule 4, note 3, *supra*). Because there is no evidence in the record that the city had advance knowledge of the likely content of any band's performance (old or new), there is no reason to believe that the city based its decision on content.

ed expression,[6] organizing to enable those individuals to communicate that expression effectively is protected by their right of association implicitly contained in the guarantees of the First Amendment. *See Healy v. James*, 408 U.S. 169 (1972); *In re Stolar*, 401 U.S. 23 (1971); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); *Louisiana ex rel. Gremillion v. N.A.A.C.P.*, 366 U.S. 293 (1961); *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L.J. 1 (1964). The Supreme Court has stated that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or *cultural matters* . . . ." *N.A.A.C.P. v. Alabama ex rel. Patterson, supra* at 460 (emphasis added). These Mummers performances are a form of cultural expression, and therefore, they are protected by the First Amendment guarantee of freedom of association. Because an association "and its members are in every practical sense identical," the organization may sue to protect the associational rights of its members. *N.A.A.C.P. v. Alabama, supra* at 459. Thus, the plaintiffs in this case have standing to challenge the city's action as an abridgement of their members' constitutionally protected freedom of association.

As in the area of freedom of expression, an individual's right of association may be limited by valid, content-neutral time, place and manner restrictions enacted by the state. *Healy v. James*, 408 U.S. 169 (1972). In *Healy*, the Supreme Court held that a state college could not deny recognition to a local student group on the basis of that group's association with the national organization of Students for a Democratic Society (SDS), without evidence that the local chapter shared that organization's philosophy of campus disruption and vio-

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6. *See* Part II A, *supra*.

lence. The Court, however, remanded the case because it was unclear from the record whether recognition had been denied because of the local chapter's possible unwillingness to adhere to "reasonable school rules governing conduct." *Id.* at 191. Viewing these rules as reasonable time, place and manner restrictions, the Court held that the students could be required to obey them, even though those rules might indirectly burden the students' freedom of association. In this case, if the district court finds on remand that the rules are valid time, place or manner restrictions,[7] enacted to further the city's substantial interest in the safety of its citizens, then the regulations may stand, despite their indirect inhibition of associational freedom.

D. *Motivation*

The plaintiffs allege that the city drafted the regulations, not to protect its citizens, but rather for the impermissible purpose of interferring with the plaintiffs' exercise of their rights to associate freely. The findings of the district court are unclear on this point. The trial judge held that the regulations served a "significant governmental interest" and that the city sought "to shorten the parade and thereby avoid the difficulties of protecting the public's safety after nightfall." *Appendix* at 249a, 250a. In addition, the parties stipulated that "[t]he reasons for the desire to end the parade before dark were concerns for public safety and public expense." *Undisputed Fact* 53, *Appendix* at 71a. In determining that other, less restrictive means of shortening the parade existed, however, the district court indicated that the city may have had other, less noble reasons for drawing the regulations as it did. "[T]he evidence establishes that the city adopted the regulation[s] to advance a nongovernmental interest of

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7. *See* Part II B, *supra*.

the city, the protection of the traditional string band. The regulation[s] discourage[] individual members of established bands from defecting to new bands and protects established bands from the competition of new bands."

Because we are unable to determine whether, or to what extent, the city was motivated by an impermissible purpose in promulgating these rules, the case must be remanded for further findings on this issue. If the city enacted these regulations only because of its concern for public safety, the rules should be judged under the "time, place and manner" standard set forth in Part II B, *supra*. By contrast, if the city enacted these regulations *solely* for the purpose of interfering with the plaintiffs' freedom of association, the regulations would, of course, be invalid. *See Healy v. James*, 408 U.S. 169 (1972); *In re Stolar*, 401 U.S. 23, 28 (1971) ("the First Amendment prohibits [a state] from penalizing an applicant . . . solely because of his membership in an organization"); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Louisiana ex rel. Gremillion v. N.A.A.C.P.*, 366 U.S. 293 (1961).

It may be, however, that the district court will find that the city acted for a variety of reasons, some permissible (such as protecting citizen safety) and some forbidden (discouraging the formation of new bands). When the government acts with mixed motives, the constitutionality of its actions must be judged by the standard set forth in *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). In *Mt. Healthy*, the school board discharged a teacher for a variety of reasons, some of which involved conduct that was protected by the First Amendment. The Supreme Court held that, even if the protected conduct was a "motivating factor" in the city's decision, the discharge would have been permissible if the city "had shown by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the [forbidden motive]." *Id.* at 287. *See also Vil-*

lage of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 270-71 n.21 (1977) (city must show "that the same decision would have resulted even had the impermissible purpose not been considered"). On remand, the plaintiffs in this case must be given the opportunity to demonstrate that the city, in adopting the parade regulations, was motivated in part by a desire to inhibit the plaintiffs' exercise of their First Amendment rights. The city must then show that it would have chosen this method of limiting the length of the parade without regard for such an "impermissible purpose." If it cannot establish this, then under the *Mt. Healthy* test the rules would be invalid.

III. *CONCLUSION*

The judgment of the district court will be vacated and the case remanded for further proceedings consistent with this opinion. Because the plaintiffs are likely to be preparing already for the 1983 Mummers Parade by purchasing costumes and rehearsing their performances, the district court may wish to expedite the hearing of this case.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-3055

MICHAEL TACYNEC, JAMES McDONALD and NORTHEAST PHILADELPHIA STRING BAND, INC.

v.

CITY OF PHILADELPHIA; ROBERT W. CRAWFORD, Commissioner, Dept. of Recreation of the City of Philadelphia; PHILADELPHIA NEW YEAR SHOOTERS AND MUMMERS ASSOCIATION, INC.; AQUA STRING BAND INC.; AVALON STRING BAND INC.; BROOMALL STRING BAND, INC.; DUFFY STRING BAND INC.; DURNING STRING BAND INC.; FERKO STRING BAND INC.; FRALINGER STRING BAND INC.; GREATER KENSINGTON STRING BAND INC.; GREATER OVERBROOK STRING BAND INC.; HEGEMAN STRING BAND INC.; POLISH AMERICAN STRING BAND INC.; QUAKER CITY STRING BAND INC.; SOUTH PHILADELPHIA STRING BAND, INC.; TRILBY STRING BAND INC.; UPTOWN STRING BAND INC.; WOODLAND STRING BAND INC. (D.C. Civil No. 80-3503)

RUSSELL J. GEISER; SOUTH JERSEY STRING BAND, INC.

v.

CITY OF PHILADELPHIA; ROBERT W. CRAWFORD,
Appellants

(D.C. Civil No. 81-2249)

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D. C. Civil Action Nos. 80-3505 and 81-2249)

Present: Adams and Higginbotham, *Circuit Judges* and Teitelbaum, *District Judge**

* Honorable Hubert L. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting be designation.

JUDGMENT

This cause came on to heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel July 20, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered November 6, 1981 be, and the same is hereby vacated and the cause remanded for further proceedings consistent with the opinion of this Court.

ATTEST:

Chief Deputy Clerk

September 2, 1982

Supreme Court, U.S.
FILED
DEC 30 1982
ALEXANDER L. STEVAS
CLERK

No. 82-919

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CITY OF PHILADELPHIA; ROBERT W. CRAWFORD, COMMISSIONER, DEPARTMENT OF RECREATION OF THE CITY OF PHILADELPHIA; NATHANIEL WASHINGTON, ACTING COMMISSIONER, DEPARTMENT OF RECREATION OF THE CITY OF PHILADELPHIA,

Petitioners

v.

MICHAEL TACYNEC, JAMES MCDONALD AND NORTHEAST PHILADELPHIA STRING BAND, INC.
and
RUSSELL J. GEISER AND SOUTH JERSEY STRING BAND, INC.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION
MICHAEL TACYNEC, JAMES MCDONALD AND NORTHEAST PHILADELPHIA STRING BAND, INC.
and
RUSSELL J. GEISER AND SOUTH JERSEY STRING BAND, INC.,

Respondents

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COUNTER-STATEMENT OF THE QUESTION PRESENTED.

Should review be granted where the Court of Appeals remanded the case to the District Court for factual findings which may remove the basis of Petitioner's petition and which have to be made to resolve this case regardless of any action taken by this Court at this time?

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COUNTER-STATEMENT OF THE CASE

Every New Years Day or designated rain date since 1901, Broad Street, the City of Philadelphia's (hereinafter referred to as the "City") main thoroughfare, has been reserved for the Mummers Parade (hereinafter referred to as "parade"). The parade is sponsored and administered by the City and features several thousand marchers in four categories: string bands, fancies, brigades, and comics, each performing distinctive Mummers music or drill while attired in Mummers costumes. During the 1950s, the number of string bands in the parade varied, with twenty-five bands marching in both 1950 and 1952. The parade ended earlier during those years than it has during the past five years. (Uncontested Facts 59 and 60). The number of string bands in the parade declined to twenty-two during the 1950s. While no written rules required the exclusion of new bands from the parade, the City observed an "unwritten rule" limiting string bands to twenty-two.

In 1977, the Juniata Park String Band was admitted as the twenty-third string band after consultations between the City's Recreation Commissioner and the established string bands. It is acknowledged by the City that the decision to admit Juniata Park String Band was made because of a threat by a City official to terminate City funds for the parade if the unit was not admitted. (Uncontested Facts 17 and 18).

Michael Tacynec formed the Northeast Philadelphia String Band, Inc. (hereinafter referred to as "Northeast") in February, 1980. (Uncontested Fact 43). Northeast applied for inclusion in the parade in May, 1980, and received no response until August, 1980, when it was invited to a String Band Division meeting chaired by the Recreation Commissioner at which its representatives were interrogated concerning the number of Northeast members who were formerly members of "established" string bands which marched in the parade.

The established string bands voted to exclude Northeast. The Commissioner refused Northeast admission to the parade. Northeast instituted the present action and requested a preliminary injunction.

At the preliminary injunction hearing on December 16, 1980, Recreation Commissioner Robert W. Crawford testified that a purpose of the "unwritten rules" barring the admission of new string bands was to prevent members of established string bands from breaking away from existing string bands to form new ones. (Uncontested Fact 77). The District Court granted a preliminary injunction compelling admission of Northeast to the 1981 parade. The Court's decision rested on findings of violations of due process and of the First Amendment. The Court held that the City had engaged in ad hoc decision making in admissions and had not applied objective standards as required by the First Amendment.

On January 16, 1981, Russell J. Geiser, the President of South Jersey String Band, Inc. (hereinafter referred to as "South Jersey"), applied for admission to the 1982 parade on behalf of South Jersey. The City never responded to this application. On June 6, 1981, South Jersey instituted an action for a permanent injunction. That action was consolidated with Northeast's pending action for a permanent injunction. It is undisputed that the members of Northeast and South Jersey are artistically competent to participate in the parade and that their performances and music are of the type presented in the parade. (Uncontested Facts 27, 28, 73).

As of June 24, 1981, the date of the pre-trial conference, the City had not promulgated any written rules concerning the admission of new units to the parade. The City agreed to promulgate such rules by July 10, 1981. The rules were formally issued on July 10, 1981 by acting Deputy Recreation Commissioner Joseph Brogan. Mr. Brogan testified that recently retired Recreation

Commissioner Robert W. Crawford was the major force in drafting the rules. It is stipulated that the reason Crawford sought the new rules was to foster the policies of the unwritten rules. (Uncontested Fact 76). The rules of July 10, 1981 prohibited any string band, which had not marched in the 1980 parade from participating in the 1982 parade.

The District Court granted a permanent injunction permitting South Jersey and Northeast to participate in the 1982 parade on the grounds that the City's rules were not the least restrictive means of limiting the time of the parade. The District Court did not rule on the freedom of association claims of South Jersey and Northeast.

On appeal, the United States Court of Appeals for the Third Circuit in an opinion by Judge Arlin M. Adams decided that the District Court had incorrectly used the "least restrictive" test and was instead required to use the "adequate alternative forum" test and remanded the case for fact finding. In addition, the Court of Appeals directed the District Court to make findings on the separate issue of whether the City's motive in adopting the parade admission rules was the impermissible one of preventing established string band members from transferring to new string bands and consequently in violation of the freedom of association guarantee of the First Amendment of the United States Constitution. As soon as this matter was remanded to the District Court, the City advised the District Court of its intention to seek certiorari and did so on December 1, 1982, preventing the District Court from making the factual findings necessary to resolve this case.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Because the Court of Appeals has Remanded this Case to the Distict Court for Fact Finding on Two Issues, Review of Only One of Those Issues Before The District Court Renders its Decision on That Issue is Premature and May Result in Unnecessary Adjudication of a Constitutional Question.

The Court of Appeals remanded this case to the District Court for factual findings on whether an adequate alternative to the Mummers Parade exists and on whether the City's rules excluding string bands which had not marched in the 1980 parade from future parades were motivated by the impermissible purpose of protecting the traditional string bands and preventing the formation of competing string bands. (A-16, A-17, A-20). Cases remanded for fact finding are not ripe for review by this Court. *Firemen v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967).

The City seeks review of the adequate alternative forum standard before the District Court has made essential factual findings. That question is premature since the District Court may find that an adequate alternative forum is available.

The Court of Appeals did not direct the District Court to determine if a parade equivalent to the Mummers Parade is available to South Jersey and Northeast. Instead the Court of Appeals in accordance with the decisions of this Court required the City to prove that an adequate alternative forum exists for South Jersey and Northeast. The District Court has not ruled on this matter. (A-16, A-17). The Court of Appeals suggested that in deciding that issue,

> . . . the district court may wish to consider factors such as the size of the audience, the prestige of an alternate parade, and the relative ability of another audience to appreciate the plaintiffs' expressive

message. Of course, no one of these factors is necessarily determinative. (A-16)

The Court of Appeals opinion permits the District Court to consider or ignore each of these factors as it deems appropriate. Even if these factors are considered the Court of Appeals specifically noted that they are not determinative of the alternative forum issue. The decision of the District Court is not a foregone conclusion.

Reserving review until the District Court makes its factual findings on the improper motivation question may remove the need to address the adequate alternative forum standard. The federal courts do not decide constitutional questions unless such a decision is required to determine the case. *Sweatt v. Painter*, 339 U.S. 629 (1950). If South Jersey and Northeast prevail on the improper motivation question on remand, no reason would exist to review the adequate alternative forum standard since South Jersey and Northeast would be entitled to admittance to the Mummers Parade even if there is an adequate alternative forum and even if the City's regulations are valid time, place, and manner restrictions. This is the only relief they seek. The City has not challenged the legal standard that the Court of Appeals directed the District Court to apply on remand to determine the improper motivation issue.

II. The City Has Failed to Assert any Reason for a Writ of Certiorari to be Granted Because The Court of Appeals in Reviewing the City's Alleged Time, Place, and Manner Restriction on Participation of String Bands in the Mummers Parade Applied the Adequate Alternative Forum Standard Which has been Mandated by The Supreme Court.

South Jersey and Northeast seek to compete as string bands in the parade on New Year's Day on Broad Street. The City has restricted participation in the string band section of the parade to those bands which played

in the 1980 parade. This denies South Jersey and Northeast the right to participate in the parade because they did not march in 1980. The rules issued by the City on July 10, 1981 to govern which units may march in the 1982 parade restrict participation in the parade to those which marched in the 1980 parade. New units will be permitted to join the parade only when units who were in the parade in 1980 indicate that they no longer wish to participate in the parade or are disqualified from the parade for two consecutive years. In the last twenty years, no unit that has participated in the parade has ever indicated it would not march in future parades. In the last twenty years, no unit which has previously marched in the parade has been prevented from marching in future parades even when it has failed to march in the preceding parade. These rules create a monopoly for the units which marched in the 1980 parade. Under this system no new unit is likely to be admitted to the parade for years, if ever. An entire generation of individuals will be denied the opportunity to participate in the parade in new units.

The City defends this restriction by contending that it is a legitimate time, place, and manner regulation of the First Amendment expression of South Jersey and Northeast. The District Court invalidated the City's rules contending that the time, place and manner regulations had to be the least restrictive means possible to achieve the City's legitimate governmental interests. The City appealed the District Court's decision to the United States Court of Appeals contending that the appropriate standard was whether or not an adequate alternative forum was available to South Jersey and Northeast. The City argues that if such a forum were available, the City's regulations were constitutionally permissible restrictions since the other two prongs of the time, place, and manner standard: 1) that no distinctions be drawn according to either the content or subject matter of the

speech to be regulated and 2) that a significant governmental interest be served had been met.

The Court of Appeals ruled in favor of the City, finding that the City had to show that there was an adequate alternative forum available for South Jersey and Northeast but did not have to show that its regulations were the least restrictive alternative (A-16). The City now requests that this Court review the Court of Appeals' ruling in its favor on this issue. The City objects to the following statement in the Court of Appeals opinion:

> In determining whether an 'adequate alternative forum' exists in the present case, the district court may wish to consider factors such as the size of the audience, the prestige of an alternate parade, and the relative ability of another audience to appreciate the plaintiffs' expressive message. *Of course no one of these factors is necessarily determinative.*(A-16) (emphasis added)

This language which the City finds objectionable is not part of the Court's remand order. The City is seeking Supreme Court review of explanatory language or statements which can be considered to be dicta and which are not essential to the result reached. The Supreme Court reviews judgments, not statements in opinions. *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956).

Furthermore, the Court of Appeals' statement concerning what the District Court may wish to consider is in accordance with the decisions of the Supreme Court of the United States. In determining whether or not an adequate alternative forum is available for the expressive conduct limited or forbidden by the regulation or statute being challenged, the Supreme Court has compared the effectiveness of the alternative forum to the effectiveness of the forum which is being restricted or closed and has also evaluated the effectiveness of the alternative forum by examining its cost and its effectiveness in com-

municating the desired message to the intended audience. The Supreme Court followed this approach in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). In that case the plaintiffs challenged a Willingboro ordinance which banned "For Sale" signs in Willingboro. In determining whether or not the ordinance left open ample alternative channels for communication the Court stated,

> Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated — primarily newspaper advertising and listing with real estate agents — involve more costs and less autonomy than 'For Sale' signs; (citations omitted) are less likely to reach persons not deliberately seeking sales information (citations omitted); and may be less effective media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold, (citations omitted). The alternatives, then, are far from satisfactory.

Based on this analysis the Court found that the Willingboro law did not meet the requirements of a valid time, place, and manner regulation since it failed to leave open adequate channels for communication by the plaintiffs. In reaching this result the Supreme Court considered the audience to be reached, the effectiveness of the alternative forum as compared to the forum which the plaintiffs sought to use in communicating its message, and the cost of the alternative forum. The Court of Appeals in stating that the District Court may wish to consider the size of the audience of an alternate parade, the prestige of an alternative parade, and the relative ability of another audience to appreciate the Respondents' expressive message has employed the same analytical structure as the Supreme Court in *Linmark*.

In *Metromedia, Inc. et al v. City of San Diego et al* 453 U.S. 490 (1981) (plurality opinion) the United States Supreme Court used the same approach as the Court of Appeals in this case in invalidating restrictions on billboards and finding that the restrictions were not valid time, place and manner restrictions because there were no adequate alternative channels available for communication. In reaching this conclusion, the Court relied upon the stipulation of the parties that

> . . . many businesses, politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive *Id.* at 516.

In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) the Supreme Court invalidated a prohibition against live entertainment in a township as violating the First Amendment based in part upon the absence of an adequate alternative forum. The Court stated,

> Furthermore, there is no evidence in the record to support the proposition that the kind of entertainment appellants wish to provide is available in reasonably nearby areas. The courts below made no such findings, and at least in their absence the ordinance excluding live entertainment cannot constitutionally be applied to appellants so as to criminalize the activities for which they have been fined. *Id.* at 76.

If the City's analysis were adopted, the Court would merely have asked whether or not the ordinance prohibited live entertainment outside the township. If it did not, and it did not, then whether or not live entertainment was available and the kind of entertainment that was available would not affect the availability of an adequate alternative forum. The standard set forth by the City would radically change the nature of the adequate alternative forum test used by the Supreme Court.

In *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981) the Supreme Court in determining whether a Minnesota State Fair regulation, which prohibited solicitation of funds and distribution of literature at the fair except from assigned booths, met the standards of a time, place, and manner regulation followed the approach used in *Linmark Associates, Inc. v. Township of Willingboro*, 431, 85 (1977) and in *Metromedia Inc. et al. v. City of San Diego et al.*, 453 U.S. 490 (1981). In *Heffron* the Court found that the limitation on solicitation of funds and distribution of literature at the fair did not prevent the plaintiffs from soliciting and distributing literature outside the fair. The plaintiffs did not contend that an adequate audience did not exist outside the fair, or that the cost of soliciting and distributing literature outside the fair was prohibitive or substantially greater than soliciting and distributing literature at the fair, or that soliciting and distributing literature outside the fair was ineffective. In addition the Court specifically found that the regulations permitted adequate opportunities for soliciting at the fair itself. According to the Court,

> . . . nor does it deny that organization the right to conduct any desired activity at some point within the forum. Its members may mingle with the crowd and orally propagate their views. The organization may also arrange for a booth and distribute and sell literature and solicit funds from that location on the fairgrounds itself. . . . Considering the limited functions of the Fair and the combined area within which it operates, we are unwilling to say that Rule 6.05 does not provide ISKON and other organizations with an adequate means to sell and solicit on the fairground. The First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.' (citation omitted) Rule 6.05

> does not unnecessarily limit that right within the fairgrounds. *Id.* 654 and 655.

In this case South Jersey and Northeast have no opportunity to participate in the Mummers Parade. No other forum exists for South Jersey and Northeast to engage in the style of dancing and playing of music known as Mummery.

In determining the existence of an adequate alternative forum, the only approach available which insures the objectives of First Amendment freedom of expression is to examine the effectiveness of the potential alternative forums in delivering the desired message to the intended audience. Not to do this would result in the adequate alternative forum standard being meaningless, since as long as some expressive means were available the test would be met even if those means were so time consuming as to be without value, prohibitive in cost, or ineffective in communicating the message to the intended audience. Thus the government under the guise of regulation could prohibit or severely impede protected First Amendment expression.

The City contends that the Court of Appeals, in the portion of its opinion indicating what the District Court may wish to consider on remand in determining whether an adequate alternative forum is available, is ruling that if the forum sought to be used is unique, then as a matter of law there is no adequate alternative forum. The Court of Appeals has not stated this at all. It does not mention the uniqueness of the Mummers Parade as being a factor to be considered on remand. The City is creating conditions which it does not have to meet and then contending that these conditions violate the decisions of this Court.

The City's contention that it cannot limit or restrict the parade is untrue. In this case restrictions are permissible if they meet the requirement of a time, place, and manner regulation. In determining the constitutionality

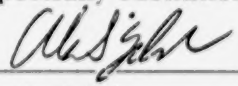
of a time, place, and manner regulation, this Court has balanced the interests of government in supervising the use of the public streets with the right of the people to utilize the public streets for First Amendment purposes. The City seeks to upset that balance. According to the City, any time it cannot meet the requirements of a time, place, and manner regulation its restrictions must prevail for the sake of administrative convenience.

CONCLUSION

The Court of Appeals remanded this case to the District Court for fact finding as to whether or not an adequate alternative forum exists for Respondents and whether or not Petitioners based their prohibition upon Respondents' participation in the parade upon improper motives. A remand order for fact finding provides no basis for a writ of certiorari since the case is not ripe for review. The District Court may find that there is an adequate alternative forum or may find that the prohibition was based upon improper motivation. Either finding would obviate any need for the review that the Petitioners now seek. The Petitioners are requesting that a Writ of Certiorari be granted to consider a hypothetical question which may or may not arise. No conflict among the circuits exists as to the adequate alternative forum standard and it presents no novel or important issue. The Court of Appeals applied settled and established concepts set forth by the United States Supreme Court in several recent decisions in its discussion of an adequate alternative forum.

For the reasons stated above, a Writ of Certiorari should not be issued.

Respectfully submitted,



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